possible that the adopted statement could be here introduced as such. While it has been said that there can be a confession by silence,[15] no cases can be found to support the proposition. Probably the courts have considered a confession too serious a matter for the defendant to be deduced from mere silence; or perhaps they have felt that to consider a statement adopted by silence as a confession is a dangerous approach to a violation of the privilege against self-incrimination.[16]

The third possibility is to admit the adopted statement as positive evidence under the Hearsay exception of statements against interest. The requirement that the declarant be unavailable is satisfied by the fact that the defendant cannot be compelled to testify,[17] which is the situation in all criminal cases. And the statement is certainly against interest.[18] But the evidence cannot be received on that ground under the existing authorities; the exception is confined to statements against pecuniary and proprietary, and does not extend to penal, interest.[19]

One further possibility remains. The silence of the accused may be evidence, and positive evidence, not by way of assent to a third person's statement, but as conduct indicating a consciousness of guilt.[20] Such evidence is not obnoxious to the Hearsay rule because it is circumstantial and not testimonial. But because of the double inference necessary to make it incriminatory (from the indication to the consciousness and thence to guilt), it is of doubtful value before a jury; and the cautions with which it would have to be encompassed in order to eliminate all testimonial bearing would practically nullify its effect. Certainly the evidence in the principal case cannot be regarded as admitted from that standpoint as it was received without qualification.

In short, there seems to be no ground upon which the defendant's silence when accused could have been admitted for the purpose of positive proof, and hence no ground upon which the principal case can be supported. The court sustained the conviction merely by citing cases in which adopted statements had been received as admissions; but, as has been seen, such adopted statements, while properly admissible, are of no value where supporting evidence is required.

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WHAT SATISFIES THE PUBLIC PURPOSE REQUIRED IN TAXATION. — The most recent illustration of the wide range of purposes that may be

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[15] See 1 GREENLEAF, EVIDENCE, 16 ed., § 215.

[16] See Bram *v.* United States, 168 U. S. 532 (1897).

[17] Harriman *v.* Brown, 8 Leigh (Va.), 697 (1837).

[18] It is this added evidential utility of admissions which explains the proposition, sometimes judicially sanctioned, that an admission is equivalent to affirmative testimony for the party offering it. "There is a wide difference between the declarations of an ordinary witness, a stranger to the suit, and the declarations of a party to the record. The former are admissible only for the purpose of impeaching or contradicting the witness, but the latter . . . may be offered to prove the truth of the matters thus admitted." Bartlett *v.* Wilbur, 53 Md. 485, 497 (1879). See also Hall *v.* Banning, 33 Cal. 522, 524 (1867).

[19] Donnelly *v.* United States, 228 U. S. 243 (1913); State *v.* West, 45 La. Ann. 928, 13 So. 173 (1893); Sussex Peerage Case, 11 Cl. & F. 85 (1844).

[20] Moore *v.* State, 1 War. (Ohio) 500 (1853); Holt *v.* State, 39 Tex. Cr. Rep. 282, 45 S. W. 1016 (1898).

public is the so-called "Non-Partisan League Legislation" in North Dakota, attacked this year in *Green* v. *Frazier*.[1] The state is predominantly agricultural, and it was felt that its development was hampered by the lack of internal financial and marketing facilities. Accordingly its constitution was amended, by removing the limit of $200,000 set on the state debt, and by adding an authorization for the state to engage in business. Then the legislature provided for $19,000,000 of bonds, and an "Industrial Commission" having under it a state bank, state warehouses, elevators and flour mills, and a state association for building and selling homes. Ten million dollars of the bonds were to provide funds for the bank to loan upon first mortgages on real estate. Taxation for all these purposes was sustained by the state court.[2] On appeal, the United States Supreme Court followed its usual practice of accepting the judgment of "the local authority, legislative and judicial." [3]

That a public purpose is necessary in taxation is well established.[4] In determining whether such a purpose is lacking, the courts are faced by two distinct problems, and much of the undoubted confusion that exists in this field has been caused by a tendency to slur these problems together. The first in importance, practically, though not logically, is the degree of weight to be attached to the legislative determination that the purpose is public. The second is the test to be employed in distinguishing public from private purposes.

As to the first of these, all courts agree in saying that the legislative determination is entitled to great weight. From this uniform premise, however, the most diverse results are obtained. As representative of the liberal extreme we may take Maine. On the question of establishing municipal fuel yards, the court held that the determination of the exigency was for the legislature alone, and that the legislature's decision as to the type of services to be rendered would not be upset if these services were "of public necessity, convenience or welfare," [5] a definition broad enough to cover almost the whole field of business enterprise. At the opposite extreme, and illustrative of the more usual stringent examination of the legislature's determination, lies Massachusetts. There a bond issue to furnish funds to be loaned on real estate has been held invalid,[6] and Opinions of the Justices have been given against fuel yards [7] and state-built homes.[8]

But whether the court be strict or liberal in its attitude, it will sooner or later be brought face to face with the second problem, the problem as to the test to be employed in distinguishing public from private pur-

[1] U. S. Sup. Ct., October Term, 1919, No. 811. See RECENT CASES, p 212, *infra*.
[2] Green *v.* Frazier, 176 N. W. 11 (N. D.) (1920).
[3] Green *v.* Frazier, note one, *supra*.
[4] Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112 (1896); Green *v.* Frazier, note one, *supra*. For a discussion of the fallacies involved in requiring a public purpose, see C. C. Maxey, "Is Government Merchandising Constitutional," 52 AM. L. REV. 215, 216.
[5] Laughlin *v.* City of Portland, 111 Me. 486, 90 Atl. 318 (1914); Jones *v.* City of Portland, 113 Me. 123, 93 Atl. 41 (1915), affirmed in 245 U. S. 217 (1917).
[6] Lowell *v.* Boston, 111 Mass. 454, 15 Am. Rep. 39 (1873).
[7] Opinion of the Justices, 155 Mass. 598, 30 N. E. 1142 (1892). Justice Holmes dissented.
[8] *Ibid.*, 211 Mass. 624, 98 N. E. 611 (1912).

poses. Here the courts have gone at the matter from every conceivable angle. Though logically the more important problem, practically this is of less consequence. Whatever test a court applies on this point, whether legislation will be upheld or overthrown depends primarily upon the court's attitude on the first problem. The opposite results on the question of fuel yards obtained in Maine and Massachusetts, which have substantially the same test upon the second problem, afford an instance of this.

Since the precise test is of secondary importance, a summary classification of the principal tests used will be sufficient. The orthodox test in the nineteenth century, as might be expected, was the historical one; public purpose was determined by the usage of the past.[9] In the present century the economic test has come into prominence, and stress is laid on the maintenance of private industrial enterprise.[10] A variant of this is the test of virtual monopoly, government ownership being allowed if the field is already closed to competition.[11] At all times courts are found which attempt to analyze the essential functions of government, and reject taxation for any purposes which are not embraced in these functions.[12] Another method is by analogy; under this test a municipal ice plant was upheld, because water supply is an admittedly proper purpose, and ice is nothing but congealed water![13] A very elastic test is to see whether the purpose falls within the "police power," which test has been held to be satisfied by state warehouses for cotton.[14]

A court must be very confident of its position before it can declare that the legislature has overstepped the limits of its discretion. The conflicting nature of the tests attempted upon the second problem should raise serious doubt in the mind of any court as to the entire accuracy of its own particular method. Hence it would seem advisable to give to the legislature's determination that degree of weight accorded by the more liberal among the courts.

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# RECENT CASES

ABATEMENT AND REVIVAL — ACTION *EX DELICTO* ABATES ON DEATH OF TORTFEASOR. — The defendant in an action for wrongful death died before the termination of the suit. A motion was made for an order to receive the action against defendant's administrator. *Held*, that the motion be denied. *Clough* v. *Gardiner*, 182 N. Y. Supp. 803.

The authorities are unanimous in supporting the principal case on the proposition that a cause of action for wrongful death will, in the absence of a statute,

[9] Loan Association *v.* Topeka, 20 Wall. (U. S.) 655 (1874); People *v.* Salem, 20 Mich. 452, 4 Am. Rep. 400 (1870).

[10] Opinion of the Justices, 211 Mass. 624, *supra*.

[11] See Bruce Wyman, "Public Callings and the Trust Problem," 17 HARV. L. REV. 217, 219.

[12] State *v.* Osawkee Township, 14 Kan. 418, 19 Am. Rep. 99 (1875); Opinion of the Justices, 182 Mass. 605, 66 N. E. 25 (1903).

[13] Holton *v.* Camilla, 134 Ga. 560, 68 S. E. 472 (1910).

[14] State *v.* Warehouse Commission, 92 S. C. 81, 75 S. E. 392 (1912). The court expressly held the statute to be a police regulation in general scope, although inoperative because of certain defects.